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Issue Date: 13 December 2002

Case No.: **2000-LHC-0912**

OWCP No.: **06-176227**

BRB No.: **01-0529**

In the matter of

JAMES R. COX,
Claimant,
v.

M.D. MOODY & SONS / MOBRO MARINE/ UNISOURCE ADMINISTRATORS, INC.,
Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

Before: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER ON REMAND

This proceeding arises out of a claim filed under the provisions of the Longshore and Harbor Workers Compensation Act (the "Act"), as amended, 33 U.S.C. § 901 et seq. This proceeding arises out of a claim filed by James R. Cox ("Claimant") against M.D. Moody & Sons ("Employer").

I. Facts[1]

[1]The following abbreviations will be used as citations to the record:
Tr. - Transcript of the Hearing;
JX - Joint Exhibits.

Claimant was employed as a welder for approximately seven years at Employer's facility, located in Green Cove Springs, Florida. (Tr. 14). At the time of the injury, he was forty-three years old and has a sixth grade education. (Tr. 13). Claimant does not possess his GED. (Tr. 13).

On May 21, 1998, Claimant testified that while at work he fell from a ladder and struck his right hip and lower back. (Tr. 20). Immediately following the accident, Claimant was taken to the emergency room and received treatment. (Tr. 21). According to medical reports, Claimant obtained X-rays while being treated at the emergency room and no fractures were revealed. (JX-19a). Claimant was placed on bed rest and attempted to return to work on May 26, 1998. (JX-19a). The medical reports state that Claimant was able to work a day and a half, but was sent home due to increasing pain. (JX-19a).

Following the accident, Dr. Steven Crenshaw, an orthopaedic surgeon, became Claimant's treating physician. (Tr. 21). After first meeting with Claimant on June 12, 1998, Dr. Crenshaw reported that Claimant suffered from a lumbar strain. (JX-19b). Dr. Crenshaw also referred Claimant to physical therapy sessions three times a week for three weeks for spinal rehabilitation. Dr. Crenshaw released Claimant to work with instructions to avoid heavy lifting and repetitive lifting. (JX-19c).

Dr. Crenshaw again met with Claimant on July 8, 1998. He stated

> Mr. Cox is now 7 weeks out from his injury. His back pain is less. He has returned to near full work. He feels he is ready to return completely.

Physical exam:	He has no tenderness in the lumbosacral spine. His range of motion is full. His gait is normal.
Impression:	Resolved Lumbar Strain.
Plan:	The patient will complete his course of PT. He is returned to full work without restrictions. I will see him back on a p.r.n. basis only. He is placed at MMI with 0% impairment rating.

(JX-19c).

Following the May 1998 accident, Claimant again injured his back outside of work while loading a boat onto a trailer in August 1998. Four days after his return to work following this incident, Claimant ceased working. He last worked for Employer August 28, 1998, and was terminated September 10, 1998 for failure to call in or report to work. Claimant subsequently sought temporary total disability compensation from August 28, 1998, and continuing, as well as medical benefits. (JX-19).

Employer also asserts that Claimant suffered from a preexisting back condition. Dr. Daniel Juba, a physician who treated Claimant from 1994 to 1996 reported in his medical records that Claimant complained of recurrent back problems. (JX-17). A report dated February 1994 states that Claimant "complains of some chronic back pain which he states he has had for years. He states that this could possibly be from his line of work where he puts a lot of strain on his lower back." (JX-17b). Similar complaints of back strains and back pain are evident throughout Dr. Juba's treatment of Claimant. (JX-17). In addition, Employer presented the medical reports of several physicians who treated Claimant prior to the May 1998 accident and reported that Claimant suffered from chronic back pain. (JX-20). In addition, Claimant testified that he never informed Employer that his back condition could have been caused by work conditions, or that previous back strains were work-related. (Tr. 41).

Claimant also testified that he had been injured at work when he was knocked off scaffolding prior to the May 1998 accident.

Although Claimant informed his superior Tommy Clark that he had had an accident, he did not inform Employer that he had sought medical treatment. (Tr. 42). Claimant testified that he did not tell his treating physician, Dr. Crenshaw, that he had injured himself at work. (Tr. 42). Claimant did not file a LHWCA claim or state workers' compensation claim as a result of any injury that occurred at work before May 21, 1998. (Tr. 44). Following the accident that occurred on May 21, 1998, Employer paid temporary total disability benefits from May 22, 1998 through June 14, 1998, and temporary partial disability benefits from June 15, 1998 through June 28, 1998. (JX-15).

II. Procedural History

A hearing was held on the above-referenced matter in Jacksonville, Florida, on June 29, 2000. In a decision and order issued by the undersigned on February 28, 2001, the Claimant was denied compensation and medical benefits. Consequently, because compensation was denied to Claimant, the undersigned did not consider whether Employer would be entitled to 8(f) relief. In the undersigned's initial Decision and Order, I held that Claimant had established the Section 20(a) presumption linking his present back condition, *i.e.*, a lumbar strain and degenerative disc disease, to his employment. However, I concluded in my order that Employer had rebutted this presumption through medical evidence, such that causation had not been established on the record as a whole. Therefore, I concluded that Claimant's compensation claim should be denied.

Claimant appealed, arguing that the medical evidence submitted did not support the undersigned's conclusion that Employer rebutted the Section 20(a) presumption. In a March 11, 2002 decision, the Benefits Review Board held that the medical evidence from which I based my finding that the Employer had rebutted the Section 20(a) presumption was insufficient. The Board cited the standard set out by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this claim arose, which has held that the Act places on the employer the duty of rebutting the Section 20(a) presumption with evidence that the employee's employment neither caused nor aggravated employee's condition. Brown v. Jacksonville Shipyards, Inc., 893 F.2d 294 (11th Cir. 1990). Consequently, the Board reversed and remanded the case for a determination of all the outstanding issues. Therefore, this court must make a determination as to the classification and duration of indemnity benefits as well as Claimant's entitlement to the payment of medical benefits.

Employer filed an appeal from the decision of the Board to the United States Court of Appeals for the Eleventh Circuit but voluntarily dismissed its appeal.

III. Issues

1) What is the nature and extent of Claimant's disability?

2) What is Claimant's date of maximum medical improvement?

3) Whether Claimant is entitled to medical benefits.

4) Whether Employer is entitled to Section 908(f) relief.

IV. Stipulations

Prior to the hearing on June 29, 2000, the parties stipulated to the following, and I accept:

1) That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2) The date of the accident is May 21, 1998;

3) An employer/employee relationship existed at the time of the accident;

4) Timely notice of the accident was given to the employer/carrier;

5) The average weekly wage is $378.54 and the compensation rate is $253.03.

V. Analysis

In my prior Decision and Order, I stated

> Dr. Crenshaw expresses numerous views during the depositions and his answers are often conflicting. He has stated that there was severe abnormality in 1997 as reflected by the MRIs, and that relevant symptoms in May 1998 had abated by early July. He has also indicated that Cox suffered the most severe pain after lifting the boat and that muscle spasm was first noted at that time.
>
> On the other hand, Dr. Crenshaw has stated that work aggravated the pre-existing low back disorder, and later stated that permanency preexisted the May fall and was not attributable to that incident. (See JX 29u through 29w). The physician indicated that the later MRI revealed findings which could be caused by the fall at work or in lifting the boat. Dr. Crenshaw stated that a

> person with a back impairment was susceptible to reaggravation.
>
> The undersigned must note that Dr. Crenshaw has expressed numerous possible causes for the present disability. The fall in May is one of the possibilities but the physician indicated that Cox was essentially symptom free in July until he lifted the boat in early August. Dr. Crenshaw has also pointed to the disability in 1997 and to the incident in August 1998 as potential causes.

(Decision and Order, dated February 28, 2001).

The Board stated

> In finding Section 20(a) rebutted, the administrative law judge noted that employer argued that claimant had fully recovered from his May work-injury by July 1998; thereafter, stating that "many of the reports of Dr. Crenshaw supported this conclusion," the administrative law judge summarily concluded that the presumption was rebutted. [citation omitted]. However, Dr. Crenshaw's opinion is insufficient to rebut Section 20(a), as he never stated that claimant's condition after August 1998 was unrelated to the work injury but rather continued to relate claimant's continuing back problems at least in part to the work injury.

(BRB Dec. and Order, 01-0529, Mar. 11, 2002 (unpublished)). The Board also determined that because Employer had offered no other relevant evidence other than the reports and testimony of Dr. Crenshaw to rebut the Section 20(a) presumption, there was no need to remand the case for reconsideration of the issue of causation. Because the Board has determined that Claimant's back problem was caused in part by the industrial accident, it is necessary to determine the nature and extent of Claimant's injury.

A. The Nature and Extent of Claimant's Disability

The burden of proving the nature and extent of disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring

Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

(1) Extent of Claimant's Disability

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1986); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, Claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliot v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). In determining the extent of a claimant's disability, the judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). A claimant's credible testimony on the existence of disability, even without objective medical evidence, may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that Claimant can perform certain types of work activity. Ruiz v. Universal Maritime Service Corp., 8 BRBS 451, 454(1978); Eller & Co. v. Golden, 620 F.2d 71 (5th Cir. 1980).

At this initial stage, Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment, Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). If the Claimant can meet this burden, then he has proven that he is totally disabled. "Usual" employment means the Claimant's regular duties at the time he was injured. The Benefits Review Board has held that a doctor's opinion that an employee's return to work would aggravate his condition could support a finding of total disability. Care v. Washington Metropolitan Area Transit Auth., 21 BRBS 248 (1988); See also Boone Newport News Shipbuilding and Dry Dock Co., 21 BRBS 1 (1988); Lobue v. Army & Air Force Exchange Service, 15 BRBS 407 (1983).

Employer argues that Claimant returned to work after the May 1998 accident, and subsequently abandoned his job after he injured himself on his fishing boat and notes that Claimant's physician did not instruct Claimant to leave his work. Employer states, "[s]ince Claimant was able to perform his job as a welder before the boat-lifting incident, that incident, and not the compensable accident, forms the basis for any inability to earn his pre-accident Average Weekly Wage." (Employer's Brief, p. 11). However, as the Benefits Review Board determined when this claim's original order was reviewed, Employer failed to rebut the presumption that the Claimant's injury was not work-related. Therefore, I am not compelled to assume that because Claimant had

returned to work prior to his August 1998 accident, he is therefore capable of returning to his former employment. Because Employer has failed to sever the Section 20(a) presumption that Claimant's condition is linked to his employment, I am not compelled to find that Claimant could have returned to work.

In addition, Dr. Crenshaw testified that when he met with Claimant

> The patient indicated to me that on returning to work as a welder he developed recurring symptoms and was having more problems with his back. He stated a week prior to that visit he was attempting to lift or load a boat and in doing so developed increased pain in his back and informed me at that time that he'd had an MRI done in the past. And I instructed him to obtain the old MRIs for me to review.
>
> He indicated to me he did not think he could continue as a heavy welder, and at that time indicated to him that we needed to look over the previous studies to try to determine what conditions and injuries he had and how we would treat that.

(JX-29o). Dr. Crenshaw met with Claimant on July 8, 1998 and placed him on maximum medical improvement, with no permanent impairment to his back as a result of the fall on May 21, 1998. (JX-29n). Following that meeting with Claimant, Dr. Crenshaw again met with Claimant on September 2, 1998. (JX-29o). Dr. Crenshaw further stated that Claimant returned to him on September 11, 1998 with MRIs that were administered in November of 1997. After reviewing the results of these MRIs, Dr. Crenshaw determined that there were disc bulges that were caused by disk degeneration, a condition that Dr. Crenshaw believed existed before Claimant's May 1998 injury. (JX-29q). In addition, on that September 11, 1998 meeting, Dr. Crenshaw restricted Claimant's work activities to medium work with no repetitive bending, but opined that Claimant has still maintained maximum medical improvement. (JX-29ii). Dr. Crenshaw testified that Claimant's condition

> ...predisposes him to pain or painful episodes or intolerance of certain activities. I don't know if it makes him any more susceptible to injuries being defined as actual tissue damage.
>
> Q: And looking back now in hindsight, now that you have the benefit of these records or that you learned there were tests in existence on 9/2/98 prior to the fall and your first treatment on 6/12/98, would someone with this low back condition that is evidences in the MRI report be restricted to – I mean, with a symptomatic low back

condition with this MRI report and the findings contained therein, be restricted from heavy-duty labor as a welder?

A: I don't know that based on the MRI alone I would make that recommendation. If the patient was having sufficient symptoms of pain and activity intolerance with these abnormalities or, for that matter, without these abnormalities if they were sufficient to cause chronic symptoms, then I would discourage his pursuing an intensive labor occupation.

(JX-29r).

Dr. Crenshaw continued to treat Claimant. He met with Claimant on October 14, 1999 and performed an MRI and a physical examination. (JX-29ii). Dr. Crenshaw stated that he noted that Claimant had "spasms in his lumbar spine, loss of motion, but no neurological deficits and no findings that indicated that he had any nerve irritability or impingement." (JX-29jj). After an MRI had been administered to compare with the results of Claimant's November 1997 MRI, Dr. Crenshaw stated,

> My belief at that point being that he had back pain predominatingly from a bad disc, that part of my discussion with people who have back injuries is to wait, to nurse it to protect it from excessive activities, to try to live with it, and if enough time goes by and they're just miserable, that there is an option of having surgery. And that was the discussion we had on 11/2/99, that I felt that now a year, almost a year and a half from his initial work-related injury when he first saw me that his symptoms had only–had worsened and were persistent, and that based on the MRI, which certainly showed that there were changes, I felt that it was reasonable to see someone regarding a spinal fusion.
>
> At that point, he informed me he had not been able to return to work. His employer had not allowed him to come back to work with those restrictions and he had not worked since he was last seen. Based on that and the MRI findings and the degree of symptoms he was having, I advised him at that point to not return to work until he has seen someone regarding a spinal fusion.

(JX-29jj-kk).

At that point, Dr. Crenshaw testified that he referred Claimant to two spine surgeons, Dr. Scharf and Dr. Keller. (JX-29kk). According to Dr. Crenshaw, this November 2, 1999 meeting was the last visit Claimant made to his office. (JX-29kk).

Dr. Crenshaw also testified that Claimant's condition would restrict his lifting ability. (JX-29pp). Dr. Crenshaw stated that he would limit Claimant's lifting capacity to no greater than 50 pounds, with frequent lifting and carrying of no more than 25 pounds. (JX-29pp).

Claimant was also examined by Dr. Abraham Rogozinski, for an independent medical examination. Dr. Rogozinski met with Claimant on January 17, 2000. (JX-25). At this conference, presumably following the physical exam, Dr. Rogozinski reported that he discussed Claimant's history, physical exam, diagnostic studies, and clinical impressions. Based on this exam, Dr. Rogozinski determined that Claimant should change positions hourly and avoid frequent bending, twisting, and lifting. Dr. Rogozinski stated, "I believe that the patient's present complaints are causally related to the injury on 5/21/1998. A preexisting condition was present and exacerbated by this most recent injury. The patient is not at MMI. " (JX-25).

In addition, Mr. Jerry Albert, a certified vocational expert, testified at the hearing on June 29, 2000. He stated that Claimant's former position consisted of welding heavy pieces of metal, which required Claimant to lift in excess of 50 to 75 pounds. (Tr. 99). Mr. Albert also characterized the position as a welder as one that would require one to work in confined spaces in awkward positions. (Tr. 99)

I find that Dr. Crenshaw's testimony and Dr Rogozinski's medical reports regarding Claimant's physical condition and limitations constitute significant evidence to support the conclusion that Claimant cannot return to his former employment as a welder. Based on these medical reports and the testimony of both Claimant's physicians and Mr. Albert, I find that Claimant is unable to return to his former position as a welder. Given the persuasiveness of these medical reports and testimony, I find that the Claimant has met his *prima facie* burden of proving that he would not be able to return to his original employment.

(a) Suitable Alternate Employment

Once the Claimant established his *prima facie* case of total disability, the burden shifts to the Employer to establish suitable alternate employment for the Claimant. Suitable alternate employment means job opportunities that are within the geographical area that the Claimant is capable of performing, considering his age, education, work experience and physical restrictions, and that Claimant would secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet the burden of proving suitable alternate employment by identifying specific jobs in close

proximity to the place which are available for the Claimant. See Royce v. Erich Construction Co., 17 BRBS 157, 158-59 (1985).

Employer argues that it has provided vocational evidence establishing the availability of seven suitable jobs in Claimant's community. Employer submitted a Vocational Evaluation and Labor Market Survey, which was administered June 19, 2000. The report covered September 11, 1998 through October 5, 1999, and also surveyed the present period the survey was administered. (JX-31b). The positions that the survey covered were in the light duty range. Claimant's limitations included limited standing, no prolonged sitting, limited walking and bending. Claimant can drive, but experiences an increase in pain when he does so. (JX-31c). The vocational evaluation stated

> In summary, Mr. Cox is a gentleman with Average intelligence who dropped out of school at approximately the sixth or seventh grade. His academics at this point in time are limited with his overall reading comprehension at the grade 5.1 level. He represented good gross motor skills working with his hands. His fine motor skills are intact. On the Bennet Mechanical Comprehension Test, he demonstrated average ability to comprehend and understand mechanical concepts.

(JX-31h).

Employer also submitted a Labor Market Survey that listed job openings for the period of September 1, 1998 to November 1, 1999. (JX-31j-31u). I find that none of these positions offered by Employer during the periods of 1998 and 1999 constitute suitable alternate employment. I base my decision on the testimony and medical opinion of Dr. Crenshaw, who last met with Claimant on November 2, 1999. At that meeting, as previously recounted above, Dr. Crenshaw stated, "I advised him at that point to not return to work until he has seen someone regarding a spinal fusion." (JX-29jj-kk). In addition, Dr. Crenshaw also testified that prior to this last meeting with Claimant he advises his patients "to wait, to nurse it to protect it from excessive activities, to try to live with it, and if enough time goes by and they're just miserable, that there is an option of having surgery." (JX-29jj-kk). In addition, Dr. Crenshaw's medical reports stated on October 5, 1999 that Claimant's "symptoms are aggravated with activities and relieved with rest....He is not been able to return to any form of work as a result of his back injury." (JX-19e). On that same visit, Dr. Crenshaw also reported that Claimant was temporarily totally disabled, and recommended that Claimant remain on temporary total disability status. (JX-19f-19-g). I find that Dr. Crenshaw's statements, combined with Dr. Crenshaw's medical reports constitute sufficient evidence to establish that Claimant was incapable of working in any position and had been advised to rest.

Therefore, based on this testimony and evidence, I reject any position offered as suitable alternate employment from 1998 through 1999.

As discussed above, on January 17, 2000 Claimant met with Dr. Rogozinski for an independent medical examination. In his report of the meeting, Dr. Rogozinski reported that Claimant would be able to work with modified, sedentary activities. (JX-25c). Dr. Rogozinski's report stated that such activities consist of lifting 10 pounds occasionally and no frequent constant lifting. He also reported that Claimant should change position hourly and avoid frequent bending, twisting, and lifting. (JX-25c-25d).

I find that Dr. Rogozinski's report and thorough evaluation of Claimant's physical limitations is persuasive evidence to show that Claimant's work restrictions became less restrictive in January 2000. Employer submitted a Labor Market Survey that listed positions that were open in the year 2000. (JX-31). Four of these positions require that the applicant have graduated from high school degree or have a GED, which Claimant does not have. Therefore, the positions of Customer Service/ Sales Representative at Mel-Ray Industries, Bell South Mobility, American General Finance, as well as the security guard opening by Guardsmark, are all unsuitable for Claimant. Therefore, the positions that remain to be considered are a machine press operator and telemarketer. (JX-31).

The position of telemarketer at Satellite Connection appears to be a position that was open on April 11, 2000, according to the Labor Market Survey. (JX-31y). This position appears to be suitable for Claimant's physical limitations, because it consists of limited lifting, and no climbing and stooping. In addition, the position does not require the applicant to have a high school education. The Labor Market Survey stated that the employer had several openings in 1999, and that the last opening was in December 1999. However, at the time that the Labor Market Survey form was filled out, the employer was seeking a bilingual applicant. Therefore, the position at Satellite Connection is unsuitable for Claimant.

The machine press operator position appears to be a position that was available May 24, 2000 and was described as a part-time position when the report was completed. Mr. Albert testified at the hearing that the position was suited for a full-time employee. (Tr. 92). The opening appears to be flexible enough to fit Claimant's physical limitations, given the fact that it allows frequent breaks for Claimant to stand and stretch as needed, and does not require heavy lifting or bending, stooping, or climbing. According to Mr. Albert, the employer for this position indicated that a position was open in December of 1999, although he also noted that this position was frequently available. (Tr. 92).

According to the Labor Market Survey, the position paid $6.00 an hour to start. (JX-31bb). In addition. Mr. Albert described this position as one that would be consistent with Claimant's prior experience. (Tr. 93).

Finally, the position of telemarketer at E-Z Claim was available on March 31, 2000. (JX-31z). The position is listed as part-time, with 20 hours a week and $5.15 an hour as the wage scale. (JX-31z). The position required only occasional standing, and a limited amount of lifting light objects. In addition, the position does not require a high school degree. (JX-31z).

Because Employer has not met its burden of showing suitable alternate employment in 1998 and 1999, I find that Claimant was totally disabled from the date he ceased working, August 28, 1998, to March 31, 2000, the date Employer established the suitable alternate employment was available through the telemarketer position at E-Z Claim. From March 31, 2000 to present, I find that Claimant was partially disabled. In addition, because Employer found suitable alternate employment available as a machine press operator on May 24, 2000, this full-time position will be used to calculate the compensation rate following May 24, 2000.

(b) Claimant's Burden to Demonstrate Diligence

Since Employer has established suitable alternate employment, Claimant must demonstrate that he diligently tried to secure employment. Hairton v. Todd Pacific Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988). Claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981).

Claimant presented no evidence to demonstrate a diligent search for employment. As Claimant has not shown diligence and Employer has demonstrated suitable alternate employment was available for Claimant, Claimant is partially disabled and cannot receive total disability benefits.

(c) Post-Injury Wage-Earning Capacity

Section 8(c)(21) of the Act provides that an award for unscheduled permanent partial disability is based on the difference between the Claimant's pre-injury average weekly wage and his post-injury wage earning capacity. An award for temporary partial disability under Section 8(e) is also based on the difference between the Claimant's average weekly wages before the injury and his wage-earning capacity after the injury.

Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity, or, if claimant has no actual earnings, the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity based on such factors as his physical condition, age, education, industrial history, earning power on the open market, and any other reasonable variable which could form a factual basis for the decision. See Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66 (1988); Cook v. Seattle Stevedore Co., 21 BRBS 4 (1988).

In the instant case, the first position that I found established suitable alternate employment on March 31, 2000 averaged out to a hourly wage of $5.15, which is $103.00 based on a twenty-hour work week. The undersigned would note that the national minimum hourly wage was $5.15 from 1997 at least through 2000. All wages for suitable jobs must be adjusted to their levels at the time of the 1998 injury. The second position that established suitable alternate employment on May 24, 2000 paid $6.00 an hour to start and according to Mr. Albert was full-time. Mr. Albert testified that this job would have paid minimum wage in 1998. (Tr. 98). The Parties stipulated that Claimant's average weekly wage was $378.54. Because I find that Claimant did have a loss of wage-earning capacity, Claimant is entitled to an award of partial disability benefits under Section 8(c)(21), and Section 8(h) of the Act. Section 8(c)(21) states

> In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 8(c)(21). Therefore, the difference between Claimant's wage-earning capacity and his stipulated average weekly wage from March 31, 2000 to May 24, 2000 is $ 275.54, and Claimant is entitled to 66.6% of such difference, plus interest. In addition, the difference between Claimant's wage-earning capacity and his stipulated average weekly wage from May 24, 2000 and continuing is $172.54, and Claimant is entitled to 66.6% of such difference, plus interest.

(2) The Nature of Claimant's Injury

Any disability suffered by Claimant before reaching maximum medical improvement ("MMI") is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Auth., 16 BRBS 231 (1984). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical

improvement. Lozada v. General Dynamics Corp., 903 F.2d (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. Leech v. Service Engineering Co., 15 BRBS 18 (1982); Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446 (1981). Claimant contends that he has not reached MMI, and Employer argues that July 8, 1998, the date that Dr. Crenshaw set MMI is the appropriate date for MMI.

Claimant's counsel argues that if Dr. Crenshaw would have examined the MRI prior to the date that he set maximum medical improvement, Dr. Crenshaw's determinations of maximum medical improvement, work status and restrictions would have been different. I am compelled to agree with Claimant that he has not yet reached MMI.

Dr. Crenshaw did in fact place Claimant at maximum medical improvement on July 8, 1998, approximately one month before Claimant hurt himself while loading his boat. After Claimant's second accident, Dr. Crenshaw still treated Claimant. As discussed *supra*, Claimant met with Dr. Crenshaw in October of 1999 and underwent an MRI. (JX-29jj). Following the 1999 MRI, Dr. Crenshaw compared the results of this recent MRI with a November 1997 MRI. At that point Dr. Crenshaw testified that Claimant's condition had worsened from the first time he had met with Claimant, and recommended a spinal fusion surgery. (JX-29jj-kk). In addition, when Claimant met with Dr. Rogozinski and received a thorough independent examination, he reported that Claimant had not yet reached MMI. (JX-25). Based on these medical reports, I find that Claimant's condition has not stabilized, and Claimant has not reached MMI. Therefore, I find that the nature of Claimant's disability is temporary.

(3) Claimant's Entitlement to Medical Care

Section 7(a) of the Act states

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). The Act states that an employer must furnish medical treatment for a work-related injury. Accordingly, in order to determine whether medicals are compensable, a finding of work-related injury is required. Turner v. Chesapeake and Potomac

Telephone Co., 16 BRBS 255, 256 (1984). Because it has already been established that Claimant's injuries are work-related, Claimant is entitled to receive payment from the Employer for all past medical bills incurred from treatment and testing of Claimant's condition, pursuant to Section 7 of the Act.

(4) Section 8(f) Relief

The Act establishes a statutory workers' compensation program for employees injured in maritime work. See 33 U.S.C. §§ 901-950. Under the Act's "aggravation rule," if an injury at work aggravates an employee's pre-existing disability, the employer is liable for the employee's entire resulting disability, not only the disability that would have been due to the work-related injury alone. See Newport News Shipbuilding and Dry Dock Co. v. Fishel, 694 F.2d 327, 329 (4th Cir. 1982). If this rule stood alone, employers would hesitate to hire handicapped and disabled applicants for fear of paying the entirety of their injuries if their pre-existing disabilities were to be aggravated at work. See Director, OWCP v. Luccitelli, 964 F.2d 1303 (2d Cir. 1992). In order to avoid this disincentive, Congress enacted 33 U.S.C. § 908(f). Section 8(f) was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. See C& P Tel. Co. v. Director, OWCP, 564 F.2d 503, 512 (D.C. Cir. 1977).

As stated above, Section 8(f) shifts part of the liability for permanent partial and permanent total disability and death benefits, from Employer to the Special Fund established by Section 44, when the disability or death is not due solely to the injury which the subject of the claim. Because the language of the Act is clear that the Special Fund is only available to Employer when the Claimant suffers from a permanent disability, I find that a discussion on Section 8(f) Special Fund Relief is moot. As discussed *supra*, Claimant was found to be temporarily totally disabled from the date he ceased working, August 28, 1998, to March 31, 2000, and temporarily partially disabled after March 31, 2000 and continuing. Therefore, because Claimant is not yet found to be permanently disabled, Section 8(f) relief is not appropriate.

VI. Order

Therefore, it is hereby ORDERED:

1) Employer, M.D. Moody & Sons, is hereby ordered to pay Claimant, James R. Cox, temporary total disability at the rate of $253.03, which is 66.6% of Claimant's average weekly wage, from August 28, 1998 to March 31, 2000. Employer shall receive credit for any compensation already paid;

2) Employer is hereby ordered to pay Claimant temporary partial disability at the rate of the $183.69, which constitutes 66.6% of the difference between Claimant's wage-earning capacity and his stipulated average weekly wage from March 31, 2000 to May 24, 2000;

3) Employer is hereby ordered to pay Claimant temporary partial disability at the rate of $114.91, which constitutes 66.6% of the difference between Claimant's wage-earning capacity and his stipulated average weekly wage from May 24, 2000 and continuing;

4) Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5) Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed on the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

6) Within thirty (30) days receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty (20) days to respond thereto;

7) Employer shall receive credit for any compensation already paid.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AM
Newport News, Virginia